Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting the Availability of Diverse and	)	MB Docket No. 16-41
Independent Sources of Video Programming	)	

COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA")[1] hereby submits its comments on the Notice of Inquiry ("NOI")[2] in the above-captioned proceeding.

INTRODUCTION

In this proceeding, the Commission aims to "begin a conversation on the state of independent and diverse programming, and to assess how the Commission or others could foster greater consumer choice and enhance diversity in the evolving video marketplace by eliminating or reducing any barriers faced by independent programming in reaching viewers."[3] Regarding the state of independent and diverse programming, by every measure, such programming is thriving and is more accessible to viewers in more ways and on more distribution platforms than ever before. The economics of existing MVPD models have always encouraged and facilitated the growth and development of high value, diverse programming. The vibrant competition in today's video marketplace continues to enhance opportunities for diverse, independent program networks that serve the needs and interests of consumers. Regulatory actions to intervene in this

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1 NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over $230 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 27 million customers.

2 *In re Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, MB Dkt. No. 16-41, FCC No. 16-19 (rel. Feb. 18, 2016) ("NOI").

3 NOI, ¶ 2.

marketplace in an effort to boost particular competitors' standing will diminish, not enhance, the benefits that such competition brings consumers.

I. INDEPENDENT AND DIVERSE PROGRAMMING IS THRIVING IN TODAY'S COMPETITIVE VIDEO MARKETPLACE.

"A central objective of multichannel video programming regulation," according to the NOI, "is to foster a diverse, robust, and competitive marketplace for the delivery of multichannel video programming."[4] By any reasonable standard, that objective has been irreversibly fulfilled. As the Commission's own annual reports on this very subject have documented, and as we demonstrate below, competition has fully taken hold in that marketplace, not only among multichannel video programming distributors ("MVPDs") and among programming networks competing for distribution by MVPDs but also among online video distributors (OVDs) and content providers.

Today's MVPDs – including incumbent cable operators, direct broadcast satellite (DBS) companies, and telephone companies and other "overbuilders" – barely resemble the cable systems of the late 20th century, which offered a few dozen channels of video programming, many of which were owned by cable companies. As the Commission has found, "[t]he major MVPDs now offer *hundreds* of television channels as well as *thousands* of video programs through VOD [video on demand] services."[5] Today, even the Commission has conceded that there are more such programming networks than it can count.[6] And only a relative handful of those channels and programs are vertically integrated with cable companies.

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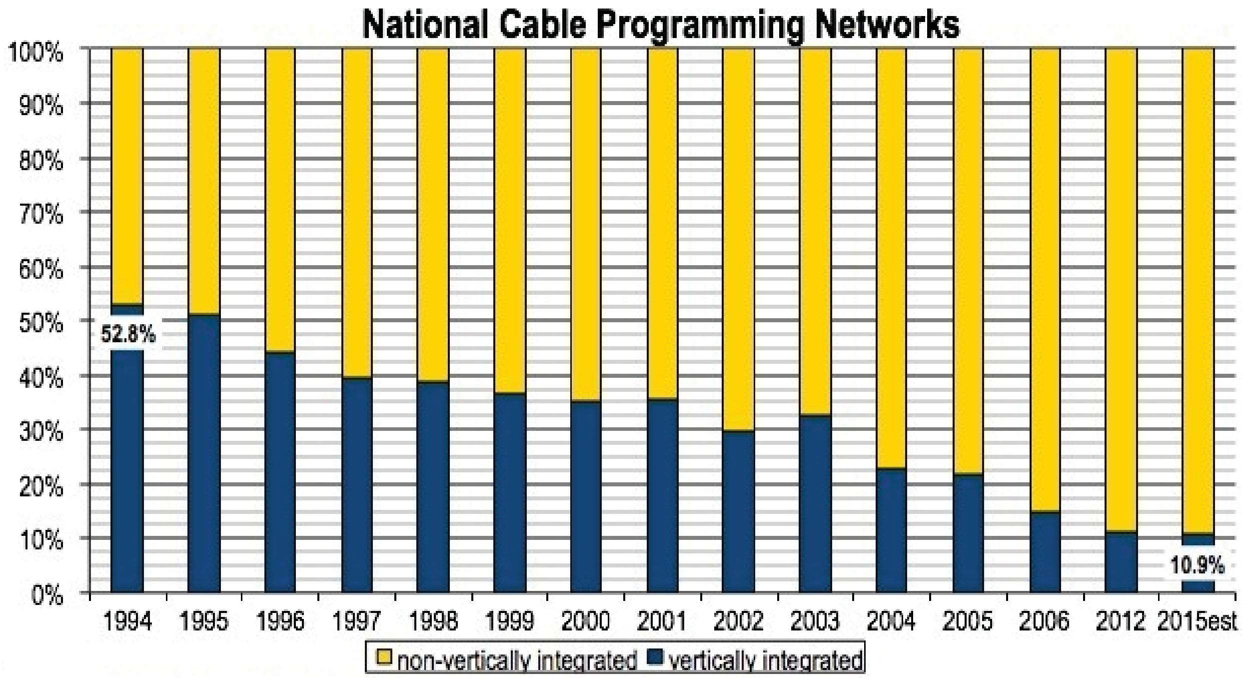
4 *Id.*

5 *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253 ¶ 18 (2015) ("Sixteenth Video Competition Report").

6 *See* NCTA Comments filed in MB Dkt. 14-16 at 10, note 13 (Mar. 21, 2014); *see also Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496 (2013) ¶ 38 ("Fifteenth Report"); *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 27 FCC Rcd 8610 (2012) ¶ 42 ("Fourteenth Report").

Vertical integration between programming networks and cable operators remains at an historic low, with little change in the number of networks owned by the largest cable operators in recent years. As the Commission noted last year, only one of the top 20 most viewed cable networks was wholly owned by a cable operator.[7]



Source: NCTA Analysis of FCC, SNL Kagan Data

In attempting to appeal to the largest number of subscribers, competing MVPDs have a strong incentive to include, in addition to general interest networks, networks that will be of particular interest to narrower segments of the population. Program networks similarly have an interest in developing unique programming that appeals to underserved audiences, such as Latino viewers,[8] African-American audiences,[9] and other ethnic and religious groups,[10] as well as those

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7 *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253 (2015) ¶ 34 ("Sixteenth Report"); *see also* Sixteenth Report, Appendix B, Table B-1; David Lieberman, Lisa de Moraes, *Cable TV Networks Wrap 2014*, Deadline, Dec. 31, 2014, *available at* http://deadline.com/2014/12/cable-television-2014-review-usa-network-espn-1201338597/.

8 *E.g.*, El Rey, Fuse, Fusion, Galavision, Baby First Americas, Discovery en Espanol, and NBC Universo.

9 *E.g.*, Africa Channel, Aspire, BET, Centric, Revolt, and TV One.

10 *E.g.*, TV Asia, TV5Monde, TV Japan, Rai Italia, EWTN, and INSP.

with interests in music, arts, and other niche interests. As a result, cable operators will continue to seek out – and will be able to find – diverse independent programming that will attract and retain subscribers.

II. IN A VIGOROUSLY COMPETITIVE MARKET, GOVERNMENT INTERVENTION IS LIKELY TO BE UNWARRANTED.

The NOI asks whether certain program carriage practices of MVPDs may "hamper the ability of programmers with limited bargaining leverage to obtain distribution of their content," and whether such practices "deprive consumers of the benefits of competition, including greater choice and diversity in programming content."[11] In a vibrantly competitive video programming marketplace, not every content provider can expect to succeed in gaining sufficient viewership to make its business model successful or even economically viable. But in such a marketplace, the carriage agreements that result do not generally *deprive* consumers of the benefits of competition. To the contrary, they are most likely to *provide* such benefits.

As Judge Kavanaugh explained in his concurring opinion in *Comcast Cable Communications v. FCC*, (the "Tennis Channel" program carriage case),

> [v]ertical integration and vertical contracts become potentially problematic only when a firm has market power in the relevant market. That's because, absent market power, vertical integration and vertical contracts are *procompetitive*. Vertical integration and vertical contracts in a competitive market encourage product innovation, lower costs for businesses, and create efficiencies – and thus reduce prices and lead to better goods and services for consumers.[12]

And, as discussed above, and as the D.C. Circuit has made clear in *Comcast Corp. v. FCC* (the "horizontal ownership" case), firms generally do *not* appear to have potentially troublesome market power in the relevant video programming distribution markets:

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11 NOI, ¶ 4.

12 *Comcast Cable Communications v. FCC*, 717 F.3d 982, 990 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (emphasis in original).

> First, the record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992. Second, over the same period there has been a dramatic increase both in the number of cable networks and in the programming available to subscribers.[13]

Thus, while carriage on an MVPD platform may be beneficial to an individual program network, the highly competitive video marketplace has minimized the risk that anticompetitive conduct will affect program carriage decisions.

The foregoing analysis provides an answer to the next question asked by the NOI: "What role, if any, should the Commission play in addressing any obstacles that prevent greater access by consumers to sources of independent and diverse programming?"[14] If promoting competition is the bottom line, as Chairman Wheeler so often submits,[15] most any regulatory action that interferes with legitimate marketplace conduct by MVPDs and program networks would be counterproductive. And furthermore, if aimed at boosting and protecting certain *competitors*, it would have the effect of distorting *competition*, and would impair the benefits of a competitive marketplace where market incentives drive operators to support diverse, independent programming as part of their pay TV offerings. As the Assistant Attorney General for the Antitrust Division recently stated, "The future of video competition should be left for the market

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[13] *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009). Similarly, as Judge Kavanaugh noted, in *Cablevision Systems Corp. v. FCC* (the case challenging the Commission's extension of the now-expired prohibition on exclusive contracts between cable operators and cable-owned program networks):

> This radically changed and highly competitive marketplace – *where no cable operator exercises market power in the downstream or upstream markets and no national video programming network is so powerful as to dominate the programming market* – completely eviscerates the justification we relied on in *Time Warner* for the ban on exclusive contracts.

Cablevision Systems Corp. v. FCC, 597 F.3d 1306, 1324 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (emphasis added). (Judge Kavanaugh dissented because the Court refrained from addressing the petitioners' First Amendment arguments, to which these market power issues were relevant.).

[14] NOI, ¶ 22.

[15] *See, e.g.* Statement, *Prepared Remarks of FCC Chairman Tom Wheeler, Silicon Flatirons* at 2 (Feb. 10, 2014).

to decide. Our role as antitrust enforcers and competition advocates is not to pick winners or losers."[16]

Program diversity has always been an important goal of the cable industry, which, especially in a competitive marketplace, seeks to attract customers by providing a wide selection of niche and minority-interest programming. But even if the Commission thought it desirable to forgo pro-competitive outcomes in order to promote *more* carriage of particular independent and diverse program networks over other providers of video content, regulating the conduct and the choices of MVPDs and program networks to achieve this result would raise First Amendment problems that constrain any regulatory options:

> To be sure, beyond an interest in policing anticompetitive behavior, the FCC may think it preferable simply as a communications policy matter to equalize or enhance the voices of various entertainment and sports networks such as the Tennis Channel. But as the Supreme Court stated in one of the most important sentences in First Amendment history, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).[17]

In sum, there is no need for regulatory intervention by the Commission to promote diversity in the video marketplace. Instead, the Commission should be vigilant to ensure that its regulatory agenda does not *impair* and *diminish* the availability of such programming. In particular, for example, in seeking to promote the competitive availability of navigation devices pursuant to Section 629, the Commission should avoid any regulatory approach that risks diverting advertising revenues – the lifeblood of most niche and minority programming – away from programmers to other entities.

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16 Bill Baer, *"Video Competition: Opportunities and Challenges," Remarks as Prepared for the Duke Law Center for Innovation Policy Fall Conference on The Future of Video Competition and Regulation*, at 8 (Oct. 9, 2015), *available at* https://www.justice.gov/opa/file/782401/download, at 8.

17 *Comcast Cable Communications v. FCC*, *supra*, 717 F.3d at 994 (Kavanaugh, J., concurring).

III. THE COMMISSION'S AUTHORITY TO PROMOTE CARRIAGE OF PARTICULAR PROGRAM NETWORKS IS NARROWLY CONSTRAINED BY THE COMMUNICATIONS ACT.

In any event, the Commission's statutory authority to impose regulation that generally promotes carriage of particular independent and diverse program networks over other providers of video content is narrowly circumscribed. The NOI asks, specifically, whether Section 257(b) or Section 616(a) of the Communications Act provides such authority.[18] The answer, in each case, is no.

Section 257, which was enacted as part of the Telecommunications Act of 1996, is not an independent source of regulatory authority for the Commission. Section 257(a) directed the Commission to

> complete a proceeding for the purpose of identifying and eliminating, by regulations *pursuant to its authority under this chapter (other than this section)*, market entry barriers for entrepreneurs and other small businesses in the provision and ownership of *telecommunications services and information services*, or in the provision of parts or services to providers of telecommunications services and information services.[19]

Section 257(b) provides that

> *In carrying out subsection (a) of this section*, the Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.[20]

And Section 257(c) provides that

> Every 3 years following the completion of the proceeding required by subsection (a) of this section, the Commission shall review and report to Congress on – (1) any regulations prescribed to eliminate barriers *within its jurisdiction* that are identified under subsection (a) of this section and that can be prescribed consistent with the public interest, convenience, and necessity; and (2) the statutory barriers

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[18] NOI, ¶ 23.

[19] 47 U.S.C. § 257(a) (emphasis added).

[20] 47 U.S.C. § 257(b) (emphasis added).

> identified under subsection (a) of this section that the Commission recommends be eliminated, consistent with the public interest, convenience, and necessity.[21]

As a threshold matter, these provisions deal only with barriers to the provision of telecommunications services and information services – and *not* to the provision of video programming. But, in any event, none of these subsections does anything but direct the Commission to consider whether there are any remaining market barriers for "entrepreneurs and other small businesses" that might be eliminated by regulations that are authorized *elsewhere* in the Act. Section 257(b) is not a grant of authority to adopt any regulations at all. It merely directed the Commission, in carrying out the proceeding mandated by Section 257(a), to keep in mind the policies of the Act favoring competition and diversity. And Section 257(c) is simply a reporting obligation, requiring the Commission to identify regulations *within its jurisdiction* that have been or might be adopted to eliminate barriers to entry.[22]

As for Section 616, that section cannot reasonably (or constitutionally) be viewed as a broad catch-all grant of jurisdiction to the Commission to regulate the marketplace dealings of MVPDs and program networks in any way that it sees fit. Section 616(a) directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors." But it also makes clear what those regulations are to be –

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21 47 U.S.C. § 257(c) (emphasis added).

22 *See Comcast Corp. v. FCC*, 600 F.3d 642, 659-60 (D.C. Cir. 2010). In that case, the Commission relied on Section 257 as a basis of authority for imposing "Open Internet" rules on Internet service providers. The Court rejected any such affirmative jurisdiction: "We readily accept that certain assertions of Commission authority could be 'reasonably ancillary' to the Commission's statutory responsibility to issue a report to Congress. For example, the Commission might impose disclosure requirements on regulated entities in order to gather data needed for such a report. But the Commission's attempt to dictate the operation of an otherwise unregulated service based on nothing more than its obligation to issue a report defies any plausible notion of 'ancillariness.' *See Motion Picture Ass'n of Am.*, 309 F.3d at 801-02 (holding that an order requiring that broadcasters incorporate "video descriptions" into certain television programs fell outside the Commission's ancillary authority even though it had been directed to produce a report on the subject)."

specifically, rules that bar MVPDs from requiring a financial interest in a program network, or from insisting on exclusivity as a condition of carriage, and rules "designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."

The Commission has rules in place to implement Section 616, and it provides ample authority for the Commission to protect independent program networks, on a case-by-case basis, from unfair conduct by MVPDs on the basis of their non-affiliation with the MVPD. But as the courts have made clear, only conduct that is unfair, unreasonable, and *based on the non-affiliation of the network* is within the scope of the prohibition.[23]

IV. THE COMMISSION SHOULD NOT REGULATE CABLE OPERATORS' PROVISION OF PEG CHANNEL PROGRAM GUIDE LISTINGS.

Cable operators for decades have made capacity available for the provision of public, educational and governmental ("PEG") channels pursuant to agreement with their franchising authority.[24] By their nature, PEG channels differ significantly from other channels that cable operators provide to their customers. Unlike virtually every other program network provided on cable systems, PEG programmers typically operate on a hyperlocal – community-by-community – basis. This unique operation accounts for why PEG channel program guide information is not handled in the same way as other program guide information presented by a cable system.

[23] *See Comcast Cable Communications v. FCC*, *supra*, 717 F.3d at 986; *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 156 (2d Cir. 2013).

[24] 47 U.S.C. § 531.

NCTA set forth these reasons in detail in a separate docket in which this question was first raised.[25] NCTA's Technical Appendix there explained that "the typical cable system serves multiple franchises with multiple PEG channels across multiple counties."[26] As a result, a single cable system that offers PEG channels from different communities served by a unitary system will typically use a generic channel identifier ("Source_ID") for PEG channels in its program guide.[27] Modifying its operation to provide specific program titles for each PEG channel would necessitate providing each franchise area within each county with its own dedicated channel map. This would require significant – and costly – changes to the typical system architecture.[28]

Of course, there are alternate ways for cable customers to obtain information about the specific programming aired on PEG channels. For example, local governments have ample opportunities to communicate with their citizens through their own websites about their viewing options on these government-provided channels.[29]

At bottom, the obligation to provide PEG channels at all remains a product of a local franchise, not FCC rules,[30] where the benefits and burdens of any such obligation can best be evaluated in the context of specific local operations, rather than in the context of any FCC rulemaking.

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[25] *See* NCTA Reply Comments filed in MB Docket No. 12-108 (Mar. 20, 2014).

[26] *Id.*, Technical Appendix at 1.

[27] *Id.,* Technical Appendix at 1-3.

[28] *Id.* at 5-6.

[29] *See, e.g.*, Arlington Public Schools, *Educational Media Production, at* http://www.apsva.us/page/1895 (last visited Mar. 23, 2016) (listing daily program schedule for Arlington Educational Channel).

[30] 47 U.S.C. § 531.

CONCLUSION

While the Commission launches an inquiry to determine what, if any, actions it might take to promote the availability of diverse and independent sources of video programming, the vibrantly competitive video marketplace that exists today is already effectively doing the job itself. Most of the hundreds of program networks available to MVPD customers today, not to mention the enormous number of online video programming providers, are not vertically integrated with an MVPD, and they offer a diversity of programming aimed at every conceivable niche and minority interest. Intervention in order to promote certain program providers over others, besides raising serious jurisdictional and constitutional problems, would only distort and interfere with the procompetitive results of this marketplace.

Respectfully submitted,

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